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No. 90-675

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In The

Supreme Court of the United States

October Term, 1990

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, a/k/a CINEMA BLUE ADULT ENTERTAINMENT CENTER, a/k/a CINEMA BLUE OF CHARLOTTE, a/k/a CINEMA BLUE, JIM ST. JOHN AND CURTIS RENE PETERSON,

Petitioners,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari To The North Carolina Court Of Appeals

REPLY BRIEF

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REPLY BRIEF

I.

EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS

Respondent attempts to attack the proffered defense evidence both from a factual and a legal basis, setting forth its factual dispute at pages 3-5 of its brief. These "concerns" are properly addressed to only the weight of such evidence, and ignore, in total, the 243 pages of testimony rendered by the proffered witnesses. However, response to some of the points raised well illustrate the lack of any basis to the purported arguments.

The state initially asserts that the results of the film study are predicated only upon the impact of "20-24 people who are more liberal in the Mecklenberg County community as a whole." First, the experts testified that the results obtain from the various film viewing groups could be combined so that the answers of all 129 participants of the film study could be considered together to provide evidence of the contemporary community standards. Second, the testimony further established that one of the purposes of conducting the film study was to *validate* a description of sexually explicit material that had been used in a telephone survey of 407 randomly selected adults from the community, and that the results of the film study did, in fact, validate that description. See App. 38-39. Third, the state is, of course, somewhat disingenuous in this argument since many scheduled participants of the film study had to be canceled due to the threat of prosecution of the expert witnesses. App. 20. Fourth, Dr. Land testified that he had performed mathematical calculations and had determined that the sample size of the film study was sufficient. Fifth, not only did Dr. Land testify that, after having evaluated the data obtained, there would be no effect on the validity of the study due to any "liberal" bias, but, more importantly, participants in the film study were actually *more conservative* in some respects than the community as a whole. For example, table 5, question 3 (the "prurient appeal" question) (App. 55) which shows that 20% of the community (as measured by the 1987 telephone survey) would find such materials appealing to a prurient interest, while *45%* of the participants in the film study (before seeing a film) would find such prurient appeal.

Respondent then asserts that the studies illustrate that "either 61% or 52% thought that adult movies were 'tolerated' in the community." What the state fails to tell this court is that the tables that it refers to were questionnaires administered *before* the participants saw the films and magazine. *After* viewing the materials, table 5 (App. 55) indicates that *only 19% of the participants believed that the films would appeal to a prurient interest.* See also App. 42.

Regarding the patent offensiveness ("tolerance") questions, the responses remain essentially the same, before and

after viewing the films. However, there is a marked question as to whether the proper "patent offensiveness" inquiry is that reflected in table 5, question 1 (App. 54) (asking whether the participant thought that such materials were tolerated in their community), or as evidenced by table 5, question 2 (App. 55) (asking whether they believed that they individually should be able to see such materials). If the latter question is correct, the patent offensiveness issue is then also resolved by an overwhelming margin of 75%.

While the issue as to the propriety of the patent offensiveness question is somewhat discussed in the film report (App. 34-35), this issue is further discussed in an article regarding this study set to appear in the Spring issue of Public Opinion Quarterly entitled: Linz, *Estimating Community Standards; The Use of Social Science Evidence in an Obscenity Prosecution*, Spring 1991, Public Opinion Quarterly 80. (Acceptance of this study for publication by such a peer-reviewed journal should also serve to illustrate the validity of the methodologies employed). Although scheduled to be published in March, undersigned counsel has obtained "printers proofs" (for proofreading prior to printing) of this article which have been filed with the library of this Court for this Court's review in the determination of these issues.[1] Linz analyzes the two potential types of "tolerance" and concludes, petitioners would contend correctly, that the proper standard is the collective opinions of the individuals about what they personally should be allowed to view. See *Linz, supra,* at 105-108.[2]

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[1] While two of the undersigned counsel are listed as co-authors of this article, counsel's participation consisted of the analysis of the obscenity law found at pages 81-85 of that article, with counsel taking no part in the analysis made, conclusions reached, or suggestions proffered in the remainder of that article.

[2] The state also argues (B.p. 4) that the "prurient appeal" question is flawed "leaving the interviewee to divine whether he is being asked about himself or the community, with response to this question being approximately 50/50 as well." The state has, however, apparently ignored the

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Nit picking through the film study report, however, ignores the proffered testimony at trial. The experts did not testify in minute detail to every single question contained in the report, nor to every minutiae of data obtained. The experts simply discussed the procedures, the critical questions involved in the obscenity test, the results obtained with regard to those questions, and their ultimate opinion as to the lack of prurient appeal and patent offensiveness of the particular materials at issue. Reviewing the introduction of the film study and the *Linz* article establishes that the studies conducted were absolutely methodologically sound, that post investigation analysis has established that the studies do not suffer from any form of bias, and that the evidence and testimony clearly could have assisted the trier of fact in determination of the issues presented to it, and would have been of benefit to the defense.

The state then raises various legal arguments to support the exclusion. First, Respondent argues (B.p. 7) that the proffered defense was not necessary to establish innocence, since two of the four charged materials were found to be not obscene without any defense being admitted whatsoever. However, what the state fails to recognize is that what this disparity of results illustrates is that the exclusion of the defense cannot be considered to be harmless error, since the evidence of the guilt of the defendants (or, more particularly, the obscenity of the charged materials) cannot be considered

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methodological introduction to the film study as set forth in App. 17-42 which illustrates that question 11 of table 8 (App. 67) is the key "prurient appeal" question *after having viewed the film, which specifically requests the viewers personal opinion, rather than the "community's" as has been implied by the state.* See also *Linz, supra,* at 97-98, 108. In addition the assertion of a "50/50 split" ignores the *post*viewing data as referenced.

The state then goes on to question the propriety of certain additional questions, some of which are in the various questionnaires as "introductory materials", and some of which are relevant to the studies. The propriety of those questions are set forth in the procedures section of the film study report found at App. 18-42.

to be overwhelming, as materials markedly similar to the materials that were found to be obscene were, on the other hand, found to be constitutionally protected by the jury. It should be of particular note as to the relevancy of the studies that of the six materials evaluated, two were found to be non-obscene (not just "not guilty" verdicts) in this prosecution (the film "Switch" and the magazine "Sexy"), a third was found to be non-obscene in the subsequent prosecution of *State v. Terry Treadwell*, No. 88-CRS-46915 (the film "Penetration"), and charges against two others were dismissed by the prosecution. This, therefore, supports the validity of the conclusions reached in the study. Had the defendants been allowed to submit their proffered defense, it is reasonably likely that there may not have been any convictions at all.

II.

LACK OF EVIDENCE OF SCIENTER

Respondent posits that the circumstantial scienter evidence against the individual Defendants was "substantial in volume," and that the Defendants had visited the Cinema Blue premises "on several occasions and therefor were familiar with the materials in the store." A simple review of the "substantial" evidence presented at trial against Petitioner Peterson is instructive in this regard. Grady Burr testified as follows:

> "He worked for Cinema Blue from July 4, 1985 until August of 1988, and first met Peterson in May or June of 1988 "when our computers were installed." Peterson's responsibility was to "put the computer in, install it, show us how to run the computer, and show us how to enter things in . . . ". T.pp. 295, 299-300.

Ernest Smith then so testified:

> He had worked at Cinema Blue from January 1982 until August of 1988 as a projectionist and then a general manager, and that the first time he met Peterson was sometime in 1982 when Peterson went upstairs to show him "how to re-time the projection equipment." The next time that he saw Peterson was

> early in April or May of 1988 when Peterson was in Charlotte to instruct them on the use of the computer. He believed that Peterson was in Charlotte installing the computer for approximately 2 weeks. The only contact he had with Peterson in 1988 was with regard to the installation of the computers. T.pp. 310-313, 346, 405-406.

Finally testifying was David Schoch:

> He worked for Cinema Blue from 1980 until August of 1988, and was employed as the manager and President. When he went to work for Cinema Blue, Mr. Peterson was his "boss", but that "St. John took over in October '86." He gave conflicting testimony as to the number of times that Peterson had been in the Cinema Blue store from October 1, 1985 to June of 1988, at one point indicating that Peterson had made one trip, and at another time indicating "about six times." He was specific, however, that "in '86, Jim St. John became [his] boss." "I'd go to Curt and ask him different things, and Curt would say that he was no longer my boss, that I would have to take my problems to Jim St. John." Peterson's sole contact at Cinema Blue in 1988 was for approximately one week to install the computer. Of the two films that were adjudicated to be obscene, "Review," had a warehouse inventory tag dated "May 20, 1988," although he did not know when the film arrived at the store. The film, "Video Games," had a tag dated "12-18-87" that meant that it came into the store sometime after that date. T.pp. 420, 424-425, 440, 452, 489, 545, 554.

This evidence is enlightening in two critical particulars. First, the totality of the evidence establishes that Peterson's *sole physical contact* at Cinema Blue in 1988 (when the two materials may have *arguably* been on premises) was to install a computer. However, there was no testimony or evidence that the materials were, in fact, at Cinema Blue at that time (the testimony may actually indicate to the contrary), or that Peterson was aware of or saw those materials, or that he had any specific knowledge whatsoever of the contents of those particular materials (or any of the other materials at the

Cinema Blue store) during the period of time that he was there to install the computer, other than being aware that the store carried "adult" materials.

Second, the unrefuted testimony established that Peterson ceased being Schoch's "boss" in early 1986, long before the two materials in question arrived at Cinema Blue. While this Court has never addressed the constitutionally requisite scienter sufficient to support obscenity *related* convictions (i.e., conspiracy, accessory before the fact, etc.), logic would dictate that the First Amendment would not allow conviction without knowledge of the contents of the particular materials charged to be obscene, or at least some type of such implied knowledge (i.e., being a "boss"), neither of which exists here. Clearly, this Court has never accepted the argument, advanced by the state here, that it is sufficient that someone merely have knowledge of the character (i.e., "adult") of materials *other* than those charged as obscene, without having any specific knowledge of the contents of *any* particular material.

III.

FAILURE TO CHARGE STATUTORY DEVIANT INSTRUCTION

The State argues that N.C.G.S. § 14-190.1(d) dealing with "especially susceptible audiences" is not a "deviant instruction" applicable to homosexuals in the context of this Court's decision in *Mishkin*.[3] In analyzing this argument, two questions must be reviewed. First, is this a statutory codification of *Mishkin*? Although the state argues otherwise, the answer is clearly "yes." This Court has consistently noted that the purpose of the obscenity test is to judge the *impact* and

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[3] The state also seems to argue that Petitioners' argument in this respect somehow "seeks to decriminalize" certain materials from the standard of obscenity. This is a ridiculous assertion as all Petitioners have requested is that the jury be properly instructed pursuant to this Court's pronouncement in *Mishkin* and the statutory language as found in the North Carolina obscenity statute. This is not a request for "construction of state statutes" as alleged by the Respondents (B.p. 13), but is, rather, a request that due process be applied.

affect of material upon the average person, or, at least, those whom it is most likely to reach. *Roth v. United States*, 354 U.S. 476, 489-490 (1957); *Manual Enterprises v. Day*, 370 U.S. 478, 487-488 (1962); *Miller v. California*, 413 U.S. 15, 20 (1973). In *Mishkin*, however, this Court quite appropriately noted that certain materials designed for and disseminated to sexual deviants would not have the effect of appealing to the prurient interest of the average person. That is the reason that this Court modified the obscenity test so that material could be judged by its "intended and probable recipient group." The North Carolina provision at issue does just that.

In addition, the North Carolina statutory language at issue is similar to the language found in other states' obscenity statutes. The "especially susceptible audiences" language as found within those statutes has been noted to be mere codification of this Court's pronouncement in *Mishkin*. See, for example, *People v. Spargo*, 431 N.E.2d 27, 32-33 (Ill. App. 2d Dist. 1982), and *Newman v. Conover*, 313 F.Supp. 623, 629-630 (N.D. Tex. 1970). See also, *Hamling v. United States*, 418 U.S. 87, 107 (1974); and *Ward v. Illinois*, 431 U.S. 767, 770 fn. 1 (1977).

The second question is whether homosexuals are a "deviant" sexual group, or, more particularly, are an "especially susceptible audience" falling within the statute. The case law is clear that homosexuals are a deviant group when considering the *Mishkin* obscenity standard.[4] In fact, *Mishkin* itself dealt with lesbian depictions. At the very least, the issue of whether the film "Video Games" is targeted to an "especially susceptible audience" was a question of fact that was stolen from the jury by the trial court's conclusion not to charge the

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[4] See, for example, *Pinkus v. United States*, 436 U.S. 293, 301-303 (1978) in conjunction with the underlying appellate decision found at 551 F.2d 1155, 1158 fn. 7, 1161 (9th Cir. 1977); *Lakin v. United States*, 363 A.2d 990, 997 fn. 9 (D.C. 1976); *United States v. Manarite*, 448 F.2d 583, 592 (2d Cir. 1971), cert. denied, 404 U.S. 947 (1971); *People v. G.I. Distributors, Inc.*, 228 N.E.2d 787 (N.Y. 1967); *United States v. Potomac News Company*, 373 F.2d 635, 640-641 (4th Cir. 1967); rev'd on other grounds, 389 U.S. 47 (1967).

complete statute. It is fundamental error and a denial of due process to fail to instruct the trier of fact with all essential elements of the crime.[5]

IV.

AFFIRMATIVE EVIDENCE AS TO THE OBSCENITY OF DEVIANT MATERIALS

The state argues that homosexuality is not so bizarre as to fit within footnote 6 of *Paris Adult*. B.p. 14. This statement is in error. See, for example, the cases cited at fn. 4, *supra*. As the evidence proffered by the Defendants in this case calls into question the assumption that jurors intuitively know the contemporary standards of the adult heterosexual community (see *Linz, supra*, at 104-109), it is therefore ridiculous to attempt to argue that the average heterosexual juror would intuitively know, beyond a reasonable doubt, the impact that certain deviant material would have upon the gay community. Although jurors may rely upon their own knowledge of the views of the "average person" in the community from which they come, *Hamling, supra*, at 104-105, it would be a baseless legal fiction to conclude that an individual juror possesses sufficient information of *homosexuals*, as opposed to the "average person", to permit prosecution without any evidence whatsoever of the impact of such deviant material on its intended and probable recipient group.

V.

RE-EXAMINATION OF *MILLER*

If there was ever a time an a case warranting the re-examination of the tri-partite obscenity test in the seventeen years since the announcement of the *Miller* decision, it is now, and it is this prosecution. The past year has witnessed the questionable extension of obscenity prosecutions, some

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[5] See, for example, *United States v. Hiscott*, 586 F.2d 1271, 1275 (8th Cir. 1978); *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964); and *United States v. Levy*, 153 F.2d 995, 998 (3rd Cir. 1946).

successful and some not, to areas that have historically been free of such concerns, exemplified by the "Mapplethorpe" prosecution against a contemporary art museum in Cincinnati, Ohio, and the numerous "2 Live Crew" prosecutions in Florida predicated against a "rap" record album and live performances of the songs contained therein.

In addition, this is the first case that this Court has reviewed since *Miller* which contains hard evidence that the underlying assumptions in *Miller* are not, or may not be valid, regardless of the platitudes argued by Respondent. The *Linz* article analyzing the studies conducted here notes and establishes, for example, that individuals perceive community standards as markedly different than actually exists (predicated upon the sum of individual personal opinions); that highly publicized prosecutions can result in misinformation regarding the community standards that may allow prosecutors, by the simple act of filing charges, to affect perceptions of those standards; that various sociological factors may impact upon the ability of individuals, particularly in the public circumstances that jurors may find themselves, to honestly project their opinions on this topic; and, most importantly, that individuals do not *inherently* know what the contemporary standards are in their community regarding sexually explicit materials. See *Linz, supra,* at 102-109. These factors, casting grave doubt on the core assumptions of *Miller,* warrant re-examination of this body of law by this Court.

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